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IN THE

SUPREME COURT

OF THE

UNITED STATES

NO. 82-496

October Term, 1982

CLYDE C. COFFEY,

Petitioner,

vs.

STATE OF WASHINGTON, Department of Social and Health Services, State of Washington,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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NO. _____

IN THE
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CLYDE C. COFFEY,

Petitioner,

vs.

STATE OF WASHINGTON, Department of Social and Health Services, State of Washington,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

The respondent State of Washington respectfully urges that the petition for issuance of a writ of certiorari in this cause be denied.

OPINION(S) BELOW

No final judgment or decision has been entered by the court below. The Supreme Court of the State of Washington simply has denied a petition for discretionary review [1] of an order by the intermediate state Court of Appeals. That order [2] dismissed petitioner's appeal on the grounds that the attempted interlocutory appeal was premature: although the order appealed from purported to be a CR 54(b)[3] partial summary judgment as to some but not all of plaintiff's claims, it was in fact not a final judgment or other appealable order

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1 See Appendix 3 to the Petition on file.

2 Appendix 2 to the Petition is a copy of the state Court of Appeal's "Commissioner's Ruling Dismissing Appeal."

3 Washington's Superior Court Rule 54(b), with but a minor and here irrelevant addition, is identical to Federal Rule of Civil Procedure 54(b).

under Washington's court rules. The Washington Supreme Court made clear in Doerflinger v. New York Life, 88 Wn. 2d 878, 567 P. 2d 230 (1977), that its refusal to entertain an appeal under the circumstances of that case --and this one-- is not a ruling on the merits of the appeal, but that the merits can more properly be reviewed on appeal after all issues had been resolved at the trial level. The court observed:

> We dismiss the appeal and remand it to the trial court. In so doing, we express no opinion on the merits of the issues raised by the appellants here and do not intend by this dismissal to foreclose further consideration of these issues at the trial court level. Doerflinger, supra at 883.

No trial has yet been held on any issues in this case. A trial date was set for December 9, 1980, when the appellant attempted to amend his tort complaint

against the State of Washington by adding a claim under 42 U.S.C. Sec. 1983 based on the same alleged factual circumstances. The amendment was opposed by respondent State on grounds that it was barred by the Eleventh Amendment to the United States Constitution, that a state is not a "person" against which suit was allowed by Sec. 1983, and that plaintiff's amended complaint failed to state a claim upon which relief could be granted under Sec. 1983. The trial court denied appellant's proposed trial amendment and continued the trial at appellant's request to enable him to seek review of the ruling. Although the trial court entered an order [4] purporting to be a final and appealable judgment under CR 54(b), the State Court of Appeals held it not to be a final or appealable order under Doerflinger, supra:

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4 See Appendix 1 to the Petition on file.

> . . . it appearing tht the claim under Section 1983 is based upon the same allegations and does not give rise to a separate set of facts, and that the appeal is from a separate theory of recovery and not a separate claim as required under CR 54(b) and R.A.P. 2.2(d) . . .

A mandate to the Superior Court to proceed to trial has been issued. [5]

JURISDICTION

This Court lacks jurisdiction of the instant petition for certiorari. Petitioner has failed to identify in the jurisdictional statement as required in Court Rule 21.1(e)(i), specifically what judgment or decree he seeks to review. Petitioner's jurisdictional statement [6] of the statutory provisions identifies only 28

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5 Appendix 4 to the Petition.
6 See Petition for Certiorari, pg. 3.

U.S.C. Sec. 1331(a) (which pertains to U.S. District Court jurisdiction) and 28 U.S.C. Sec. 1257(3). The latter statute authorizes review by writ of certiorari in this Court only when a final judgment or decree has been entered below. None of the "opinions below" constitute a final judgment as a matter of state law.

COUNTERSTATEMENT OF THE CASE

No trial has been held because appellant sought and obtained a continuance on the morning of trial to seek review of the denial of the time-of-trial motion to amend the complaint to add a Sec. 1983 civil rights violation claim to the previously alleged tort action against the respondent State.

Petitioner's "Statement of the Case" is merely his perception of what he hopes

the evidence will show. Virtually all the claims therein set forth will be disputed at trial.

Even if it were assumed arguendo that appellant's statement of the case was factually correct, the amendment to the Complaint[7] which was denied by the trial court's order, did not purport to allege (as petitioner's "Statement of the Case" now alleges) that violations of his "Fourteenth Amendment rights" were the basis for his claim under the Civil Rights Act of 1971, (42 U.S.C. Sec. 1983). The proposed amendment incorporated by reference the allegations of "conduct and acts" set forth in plaintiff's "Complaint for Damages," [8] which pled no violation of

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7 See the "third cause of action" set forth in the "Supplemental Notice of Trial Amendment," a copy of which is attached as Appendix 1 hereto.

8 Appendix 2 hereto is a copy of plaintiff's "Complaint For Damages."

any federal statute or constitutional requirement. The complaint alleges only violations by state employees of state statutes.

Plaintiff's proposed amendment to the Complaint merely recites a new theory of recovery (under Sec. 1983) based on the same facts and circumstances that already had been alleged in his tort claim. The appellate court's refusal to treat the trial court order denying appellant's proposed amendment as an appealable final order was based on the Washington state court's rules of what constitutes an appealable order (CR 54(b)). The state court's interpretation of the state rule followed the federal practice (88 Wn.2d at 882):

> . . . While clearly the court did abandon the mechanical requirement that only claims which are factually separate and independent are multiple claims,

nevertheless, cases since then have not gone so far as to treat every variation in legal theory as a separate claim. See, e.g. CMAX, Inc. v. Drewery Photocolor Corp., 295 F.2d 695 (9th Cir. 1961); Baca Land & Cattle Co. v. New Mexico Timber, Inc., 384 F.2d 701 (10th Cir. 1967).

We concur with the approach of the federal courts. Therefore, while we reject the test in Gazin, we hold the separate legal theories presented by appellants are not multiple claims and thus are not subject to the entry of final judgment upon dismissal by the trial court.

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied. There has been no final judgment or decree in the state courts and therefore no jurisdiction arises under 28 U.S.C. Sec. 1257 for issuance of the writ. Furthermore, the trial court decision, which is not a final state court decision, that a "state" is not a "person" within the

intent of Sec. 1983 is consistent with, not in conflict with, federal law as decided by this Court.

Petitioner has failed to show any special or important reason as set forth in Supreme Court Rule 17, or otherwise, for issuance of the writ.

ARGUMENT

1. Jurisdiction Is Lacking In This Court To Issue A Writ Of Certiorari Where There Has Been No Final Judgment Or Decree In The State Court Below.

28 U.S.C. Sec. 1257, under which petitioner seeks to invoke this Court's jurisdiction, allows review only of a final judgment or decree. No such final judgment or decree has been entered below. The decision of the state Court of Appeals,

which the state Supreme Court has refused to review, was merely that the trial court's order denying appellant's trial amendment was not yet an appealable final judgment subject to review. That decision leaves open the opportunity for appellant to reopen the issue on the merits at the trial level, and, if he continues to be unsuccessful there, on appeal of a final judgment after trial. That is made clear by the appellate court's express reliance on Doerflinger, supra. See the quoted material at pg. 3, 4, supra.

An attempt to obtain review of a state lower court decision by certiorari should be dismissed where the state court decision makes it clear that petitioner can raise constitutional issues in the trial court and obtain appellate review to the state appellate courts. Costarelli v. Massachusetts, 421 U.S. 193, 95

S.Ct. 1534, 44 L.Ed.2d 76 (1975), Batemas v. Arizona, 429 U.S. 1302, 97 S.Ct. 1, 50 L.Ed.2d 32 (1976). A writ of certiorari attempting to review denial of an interlocutory appeal should be dismissed in view of the lack of finality of the order. Whitus v. State of Georgia, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 559 (1967).

The burden is on petitioner to establish the Court's jurisdiction. Republic Natural Gas Co. v. State of Oklahoma, 334 U.S. 62, 70-71, 68 S.Ct. 972, 92 L.Ed. 1212 (1948):

> Merely because a party to a litigation may be temporarily out of pocket, is not sufficient to warrant immediate review of an incomplete State judgment.

(2) Appellant Has Failed To Establish Any Reason For Granting A Writ As Required By Supreme Court Rule 17.

The trial court's decision that a Sec. 1983 claim does not lie against a state is consistent with rulings of this Court. Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979); Alabama v. Pugh, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978); the federal Court of Appeals, McConnell v. Critchlow, 661 F.2d 116 (9th Cir. 1981); and the Washington state Supreme Court, Edgar v. State, 92 Wn.2d 217, 595 P.2d 534, cert. denied 444 U.S. 1077 (1979).

None of the considerations for granting a writ of certiorari set forth in Supreme Court Rule 17 are present in this case. Petitioner's suggestion that Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) somehow undermines this Court's earlier rulings that a state is not a "person" within the meaning of Sec. 1983 is a rank

misconstruction of Owen. That decision merely addressed the question expressly left open by Monell v. New York City Department of Soc. Serv., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1973) of whether municipal corporations held suable in Sec. 1983 actions by Monell retained any immunity defenses in such suits.

What "special and important reason" warrants issuance of a writ in this case in which petitioner has pointed out no inadequacy or unavailability of due process if he is limited to a tort theory of recovery against the State as he originally alleged? No showing has been made here or below, that any substantial difference in state court procedure is involved. Nor has petitioner pointed out any substantive difference in remedy available under his new theory.

Petitioner's proposed amendment to his state-court, tort complaint below adds no additional or different factual allegations to support a Sec. 1983 claim. To the contrary, his interrogatory answers appear to limit his complaint to alleged violations of state, not federal, statutes by state employees. Petitioner's tort complaint against the State in the trial court below seeks the same relief for the very same facts and circumstances, the same "conduct and acts" of the same state employees, as does his proposed amendment. Nowhere in his petition does he suggest how his state court remedies in tort are any less effective than those under Sec. 1983.

Even if that section authorized claims against states, which it does not, appellant's pleadings below, including the rejected amendment, fail to adequately allege an action under 42 U.S.C. Sec. 1983

for violation of the due process clause of the Fourteenth Amendment. The claimed violations did not occur as the result of some established state procedure, but rather as the result of the alleged failure of the state's agents to follow established state procedures and statutes, [9] and, the state itself provides an adequate remedy to persons who believe they have suffered a tortious loss at the state's hands. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1980, 68 L.Ed.2d 420 (1981). The Parratt approach of considering "the adequacy and availability (not exhaustion) of remedies under state law before concluding that a deprivation of life, liberty or property violates due process of law" also has been used in determining the adequacy of attempts to plead Sec. 1983 claims involving interference with family

9 See, for example, paragraphs 5(a) and (e) of the Complaint, Appendix 2 hereto.

relationships. Ellis v. Hamilton, 669 F.2d 510 (7th Cir. 1982); Wise v. Bravo, 666 F.2d 1328 (10th Cir. 1981). In deprivation of liberty cases under Sec. 1983, where there is no practical way to provide a predeprivation hearing, and the postdeprivation hearing provided by state law satisfies the due process requirements of the Fourteenth Amendment, it has been held that the alleged deprivation was not without due process of law. Particularly is this the case where petitioner actually has sought redress under the state law in the state court. Rutledge v. Arizona Board of Regents, 660 F.2d 1345 (9th Cir. 1981).

Moreover, respondeat superior is not a permissible theory for holding a local governmental body liable for constitutional violations of its employees Monell v. New York City Dept. of Soc. Serv., supra; Wise v. Bravo, supra. Plaintiff's

Complaint, paragraphs 3 and 5 make it clear that plaintiff's allegations relate to claimed wrongs of defendant state's employees in violation of state law and policy. Appendix 2.

Even if the State of Washington (as distinguished from its officers, agents and employees acting under color of its authority) were subject to suit under 42 U.S.C. Sec. 1983 petitioner has failed to adequately state a claim thereunder.

CONCLUSION

The absence of a final decision or judgment in the court below precludes this Court from exercising jurisdiction under 28 U.S.C. Sec. 1257. The policy of that statute against piecemeal review and interference with an orderly judicial process is particularly applicable to this

case where petitioner has adequate remedies, which he is actively pursuing in the very state court forum.

Even if a Sec. 1983 claim were allowable against a "state," petitioner has failed to state a claim under the statute and failed to show how the available state-court, tort remedy is lacking in due process or inadequate.

Similarly petitioner has failed to demonstrate any special or important reason warranting interlocutory review by certiorari of a pre-trial order of the trial court. Under clearly expressed state court rules and decisions the merits of the trial court pretrial order are subject to review on appeal by the state appellate courts. They have not been reviewed on the merits as yet solely because petitioner attempted an interlocutory appeal of a

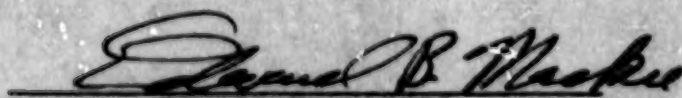
pre-trial order without awaiting entry of a final, appealable judgment.

Respondent requests that the petition for writ be denied.

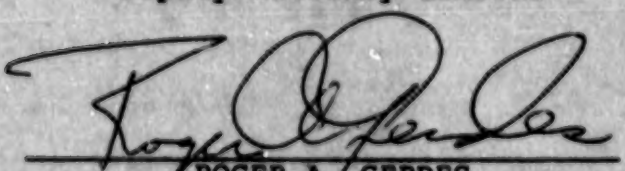
DATED this 15th day of October, 1982.

Respectfully submitted,

KENNETH O. EIKENBERRY
Washington State Attorney General



EDWARD B. MACKIE
Deputy Attorney General



ROGER A. GERDES
Assistant Attorney General
Counsel for Respondent

APPENDIX 1

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR KING COUNTY

CLYDE C. COFFEY, Plaintiff,	)	NO. 863 246
v.	)	SUPPLEMENTAL NOTICE OF TRIAL AMENDMENT
STATE OF WASHINGTON, et al., Defendants.	)	

TO: The above named defendants and their attorneys of record

YOU AND EACH OF YOU WILL TAKE NOTICE that plaintif will orally move to amend his Complaint herein to add the following paragraphs thereto:

And for a second and separate cause of action against defendants, plaintiff alleges:

1.

That plaintiff realleges paragraphs 1 through 5 above.

2.

That the conduct of defendant toward plaintiff was outrageous, extreme, deliberate and wilful, going beyond the bounds of decency, proximately causing plaintiff severe emotional and mental distress and anxiety, all to his damage in the sum of $235,000.00.

And for a third cause of action against the defendants, plaintiff alleges:

1.

That the conduct and acts of the defendant violated the plaintiff's civil rights under the Civil Rights Act of 1871, which proximately caused the severe

emotional and mental distress and anxiety to plaintiff herein above alleged, all to plaintiff's damage in the sum of $235,000.00.

Dated this 17th day of June, 1980.

ROBERT H. STEVENSON

Attorney for Plaintiff

APPENDIX 2

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR KING COUNTY

CLYDE C. COFFEEY, Plaintiff,	NO. 863246
v.	COMPLAINT FOR DAMAGES
STATE OF WASHINGTON, AND DEPARTMENT OF SOCIAL AND HEALTH SERVICES, STATE OF WASHINGTON, WASHINGTON, Defendants.	

COMES NOW the Plaintiff and alleges:

1.

That Plaintiff is now and at all times material herein was a resident of Seattle, King County, Washington and had legal custody and control of his minor daughter, Cynthia Coffey, age 14.

2.

That on or about March 2, 1979, Plaintiff presented and filed his verified claim for damages herein described against the Defendants with the Office of Financial Management of the State of Washington pursuant to R.C.W. 4.92.100, Laws of the State of Washington.

3.

That on or about February of 1979 in Seattle, Washington, the Department of Social and Health Services, a department of the State of Washington, by and through its agents, servants and employees, negligently, wilfully and without a hearing, deprived Plaintiff of the physical custody of his 14-year old daughter, Cynthia Coffey; that at or about said time and place said Defendant wrongfully advised Plaintiff that he had no right to a hearing

concerning the matter and "no rights at all" as a parent; that Plaintiff was also advised that if Plaintiff refused to sign "papers" to place Cynthia in a school or foster home at once, she would be permanently taken from Plaintiff; that Plaintiff must place Cynthia in the Ruth School in Seattle and that Plaintiff would be required to entertain Cynthia on Saturdays and Sundays by spending at least $25 per day on her; that the rules of Plaintiff's home with respect to the discipline of Cynthia were no longer viable or applicable.

4.

That as a result of the foregoing threats and coercion by Defendant, Plaintiff placed the custody of Cynthia Coffey in the Ruth School on or about February 28, 1979. That thereafter, Cynthia Coffey ran away from said school

because of the lack of proper supervision and control. That Plaintiff's daughter was missing for several weeks from said school and her whereabouts unknown to Plaintiff and the school; that thereafter Plaintiff's daughter contacted Plaintiff voluntarily and returned to Plaintiff's home of her own free will and accord, refusing to go back to said school again.

5.

That Defendants were negligent and guilty of misfeasance and wilful misconduct in the following manner:

(a) in failing to afford the Plaintiff a judicial hearing with respect to the claimed abuses and his daughter and her physical custody or control pursuant to R.C.W. 26.44.053.

(b) in threatening to deprive

permanently Plaintiff of his daughter's custody if Plaintiff did not "sign papers" immediately for her entrance into a school picked by the Department of Social and Health Services.

(c) in advising Plaintiff that his own home rules with respect to his daughter's discipline no longer was viable or applicable.

(d) in coercing Plaintiff to place his daughter in the Ruth School where she immediately ran away, resulting in her whereabouts being unknown for weeks by Plaintiff or the school.

(e) in failing to follow the statutes of the State of Washington with respect to claimed physical abuse by a minor, i.e. investigating tthe allegations, making reports available to Plaintiff, taking

physical custody of Plaintiff's daughter and failing to afford Plaintiff a hearing regarding all of same.

6.

That as a direct and proximate result of the negligence, misfeasance and wilful misconduct of the Defendants as aforesaid, Plaintiff suffered and continues to suffer pain, personal humiliation, discomfort, and acute distress, all to his damage in the sum of $235,000.

WHEREFORE Plaintiff prays for judgment against Defendant in the sum of $235,000 and his costs herein.

ROBERT H. STEVENSON

STATE OF WASHINGTON)
County of King)

CLYDE C. COFFEY, being first duly sworn deposes and says that he is the Plaintiff in the above-entitled action, has read the foregoing, and believes it to be true to his knowledge and belief.

CLYDE C. COFFEY

SUBSCRIBED AND SWORN TO before me this 4th day of May, 1979.

_____

NOTARY PUBLIC in and for the State of Washington residing in Renton.